Office-Supreme Court, U. S.
FILED
JUN 29 1951
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 159

FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION, ET AL.,

Appellants,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

CHARLES COOK HOWELL,
G. L. REEVES,
FRANK G. KURKA,
Counsel for Appellee.

INDEX

Subject Index

	Page
Statement opposing jurisdiction and motion to dismiss or affirm	1
Statement of issues on appeal	3
The facts	3
Appellee had no adequate remedy in the Florida state courts	5
Supersedeas not available in Florida	8
If there once were a remedy in the Florida Courts it has been lost by no fault of the appellee's	12

Table of Cases Cited

Alabama Public Service Commission v. *Southern Railway Co.*, No. 395, October Term, 1950 (decided May 21, 1951, 19 U.S.L. Week 4314) 3, 5, 9, 12, 13

Ann Arbor R. Co. v. *Michigan Public Service Commission*, 91 F. Supp. 668 13

Atlantic Coast Line R. Co. v. *Alabama Public Service Commission*, 92 F. Supp. 579 13

Atlantic Coast Line R. Co. v. *King*, — Fla. —, 47 So. (2d) 514 5

Atlantic Coast Line R. Co. v. *Public Service Commission of South Carolina*, 77 F. Supp. 675 13

Atlantic Coast Line R. Co. v. *United States Sugar Corp.*, — Fla. —, 47 So. (2d) 513 5

Baker v. *Farish*, 244 Ala. 178, 12 So. (2d) 547 11

Brinson v. *Tharin*, 99 Fla. 696, 127 So. 313 8

Chicago, B. & Q. R. Co. v. *Board of Railroad Commissioners*, 78 F. Supp. 1010 13

Chicago, B. & Q. R. Co. v. *Illinois Commerce Commission*, 82 F. Supp. 368 13

Columbian Cat Fanciers, Inc. v. *Koehue*, 96 F. (2d) 529 11

Delaware, L. & W. Ry. Co. v. *Van Santvoord, et al.*, 216 F. 252, 232 F. 978 13

Page

Farnham v. *Caldwell*, 141 Fla. 416, 193 So. 286 6
First Nat. Bank v. *Gibbs*, 78 Fla. 118, 82 So. 618 6
Florida East Coast Ry. Co. v. *State*, 79 Fla. 66, 83 So. 708 10
Florida R.R. & P.U.C. v. *Atlantic Coast Line R. Co.*, 96 F. Supp. 583 3
Great Northern Ry. Co. v. *Nagle*, 16 F. Supp. 532 13
Harrell v. *Vieg*, 246 Ala. 669, 22 So. (2d) 94 11
Jacksonville American Pub. Co. v. *Jacksonville P. Co.*, 143 Fla. 835, 197 So. 672 8
Northern Pacific Ry. Co. v. *Board of Railroad Commissioners of Montana*, 46 F. Supp. 340 13
Pacific Tel. & Tel. Co. v. *Kuykendall*, 265 U. S. 196 .. 9
Railroad Commission v. *Pullman Co.*, 312 U. S. 496 .. 14
St. Louis, etc., R. Co. v. *Public Commission*, 279 U. S. 560 14
South Atlantic S.S. Co. of Delaware v. *Tutson*, 139 Fla. 405, 190 So. 675 6
Southern Ry. Co. v. *Alabama Pub. Ser. Comm.*, 91 F. Supp. 980 13
Spector Motor Service v. *O'Connor*, 95 L. ed. 435 14
Stansell v. *Marlin*, 153 Fla. 421, 14 So. (2d) 892 7
Wade v. *Mayo*, 334 U. S. 672 7
Wolkowsky v. *Goodkind*, 153 Fla. 267, 14 So. (2d) 398 ..... 7, 8

STATUTES CITED

Alabama Code, 1940, Title 48, Sec's. 81, 84, 88 9
Alabama Code, 1941, Title 48, Sec. 82 8
Congressional Record, Vol. 93, p. 8550 2
Florida Statutes, 1941, Sec. 59.13(7) 9
Florida Statutes, 1941, Sec. 350.641 12
Rules of the Supreme Court of Florida, Rule 35(f) .. 9

United States Code, Title 28:

Section 2101(a) 2
Section 2101(b) 2

United States Code Congressional Service, 1948, pp. 1958, 1993 2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 159

FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION, ET AL.,

Appellants,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

APPELLEE'S MOTION TO DISMISS OR AFFIRM, AND STATEMENT IN OPPOSITION TO APPELLANTS' JURISDICTIONAL STATEMENT.

The Appellee Railroad Company files this statement in opposition to Appellants' jurisdictional statement, and includes a motion to dismiss the appeal or to affirm the judgment.

The motion to dismiss is based on the fact that Appellee never had an adequate remedy in the courts of Florida, and

that if it once had such a remedy it has been lost through no fault of the Appellee's.[1]

The order allowing the appeal, rendered May 25, 1951, was signed by the three judges who signed the judgment. It bears on its face the unique notation "filed before me this 25th day of May, 1951, Dozier A. DeVane, District Judge". However, it was not filed in the Clerk's office until May 28, 1951. If the judgment did not become effective until filing, what shall be said about this order allowing the appeal?

Two citations were issued: One signed by the Clerk and the other by District Judge DeVane. Both are dated May 25, 1951. The first citation was served May 28, 1951; later the citation signed by the Judge was served June 4, 1951.

If the appeal is not dismissed the case should be affirmed because the appeal presents no substantial question.

In any event, and if the worst hoped by the Appellants should befall the Appellee here, the District Court should retain jurisdiction for a reasonable time to permit the Ap-

---

[1] While our motion to dismiss is not based at all on technical grounds, there is an untimeliness in the appeal and some peculiarities, not to say irregularities, about it that well might justify the dismissal of the appeal. Unlike other appeal statutes (28 U. S. Code 2101(a), (c)), which authorize the taking of other appeals to this Court within thirty, and ninety days, respectively, after the "entry" of the judgment or decree, the statute regulating this appeal (28 U. S. Code 2101 (b)) requires it to be taken within sixty days "from the judgment", nothing being said about either "entry" or "rendition". The judgment appealed from was rendered and dated March 20, 1951. It was filed in the Clerk's office March 26, 1951 and the appeal was not taken until May 25, 1951, more than sixty days "from the judgment" and exactly sixty days from the "entry" of the judgment. There is no indication in the legislative history that these statutory differences were due to an oversight. Circuit Judge Maris, testifying before the House Sub-Committee No. 1, March 7, 1947, said that the successive drafts of Title 28 of the Code "were considered section by section". (U. S. Code Congressional Service, 1948, p. 1958). When the bill to adopt the Code was debated in the House July 7, 1947, Mr. Robsion said (93 Congressional Record, 8550; U. S. Code Congressional Service, 1948, p. 1993) that the drafts were reviewed by the Committee on Revision of the Laws, in conjunction with the Judicial Conference Committee, "section by section".

pellee to seek review in the State courts of Florida of the order appealed from.

I

Statement of Issues on Appeal

The Appellants plant the appeal solely upon the holding of this Court in *Alabama Public Service Commission* v. *Southern Railway Company*, No. 395, October Term 1950, decided May 21, 1951 (19 U.S.L. Week 4314); and the only question presented therefore is whether the 3-Judge Federal Court sitting in Florida which decided this case in the exercise of jurisdiction which undoubtedly it had, should have abstained from exercising that jurisdiction so that the litigation might have been had in the Florida State courts.

The opinion of the District Court in this case is reported in 96 F. Supp. 583.

II

The Facts

The Railroad Company during a period beginning May 1948 and ending with June 1950 had been operating at a heavy loss two of its trains which ran daily between Clewiston, Florida and Lakeland, Florida. The Company made appropriate application to the Florida Railroad and Public Utilities Commission for authority to curtail such operations so that the trains would run in opposite directions on alternate days of the week but with no service in either direction on Sunday. Such desired curtailed operations were designated by the District Court as comprising "triweekly service".

The Florida Commission denied the application. The Railroad Company instituted this suit in the District Court. There it was tried *de novo*, the Florida Commission offering no evidence but announcing that it stood on a motion to dismiss which it had filed, which motion was based solely on

grounds, to quote the opinion of the 3-Judge Court (96 F. Supp. 584), that Coast Line "should have defied the order and forced the Commission to proceed in some form against it, or taken this case into the State court, instead of the Federal court, for relief". No ground of the motion went to the point upon which the Commission seeks here to reverse the judgment.

At the trial before the District Court the Railroad Company proved, according to the findings of the Court (96 F. Supp. 585, 586, 587):

1. That "for the twelve-months' period from May 1, 1948 through April 30, 1949, Plaintiff sustained passenger service losses of $213,594.69 and that for the following fourteen-months' period from May 1, 1949 through June 30, 1950, Plaintiff sustained further losses of $217,019.67". (Those losses ran at the rate of approximately $16,562.09 each month, $544.00 every day. If the maximum revenues had been lost by the curtailment of the operations, there would have resulted nevertheless annual savings in direct expenses of $3,800.00 per month (par. VII, Sworn Bill of Complaint).)

2. That "Plaintiff lost more than $921,000.00 on its system passenger business in 1946; more than $8,600,000.00 in 1947; more than $9,600,000.00 in 1948 and more than $8,700,000.00 in 1949. The evidence also shows that in 1949, after meeting the deficit of $8,700,000.00 in passenger system losses, Plaintiff had a net railway operating income of $6,753,898.91. All this shows the extent to which freight rates have been increased to take care of passenger operating losses".

3. That "the net Railway operating income produced a rate of return on the total investment in the property of less than 1% for the years of 1946 and 1947 and less than 2%

for the year 1948. The evidence also shows that the rate of return for 1949 was little, if any, better than for 1948".

And the District Court concluded that, "it is obvious to everyone that a rate of return less than 2% is not a fair return on property devoted to public services"; and found as a concluding fact that the continuation of the daily service "is not necessary to meet the public interests and is confiscatory of Plaintiff's property". 96 F. Supp. 587.

The evidence also showed, though not so found by the District Court, that Coast Line's return on its investment in 1949 after deduction for fixed charges, was only .76 of 1%.

III

Appellee Had No Adequate Remedy in the Florida State Courts

Florida has afforded in a case like this, no "right of appeal to the State courts" (*Alabama Public Service Commission* v. *Southern Railway Co.*, No. 395, October Term 1950, decided May 21, 1951) as the State of Alabama had in that case.

No remedy by appeal from an order of the Florida Railroad and Public Utilities Commission is afforded by the laws of Florida. The method of review prescribed is by certiorari, and recent attempts by the Appellee here to take advantage of the right of appeal have met with disaster. *Atlantic C.L.R. Co.* v. *King*, — Fla. —, 47 So. 2d 514 (1950); *Atlantic C.L.R. Co.* v. *U. S. Sugar Corp.*, — Fla. —, 47 So. 2d 513 (1950). In their jurisdictional statement Appellants criticize Appellee for not "pursuing its right to have said order [of the Commission's] reviewed by the Supreme Court of Florida, as provided by Florida procedure". There is no such right. Certiorari, under the law of Florida, is not of right but a matter of grace.

> "The exercise of jurisdiction under writ of certiorari is quite different from the exercise on appeal or writ

> of error. The former is a discretionary writ used to determine whether the essential requirements of the law have not been complied with to the material injury of petitioner. An appeal or writ of error is taken as matter of right to have determined whether harmful error has been committed. See Jacksonville T. & K.W. Ry. Co. v. Boy, 34 Fla. 389, 16 So. 290; Harrison v. Frink, 75 Fla. 22, 77 So. 663; Brinson v. Tharin, 99 Fla. 696, 127 So. 313".

South Atlantic S.S. Co. of Delaware v. *Tutson, et al.*, 139 Fla. 405, 190 So. 675, 683 (1939).

The scope of certiorari in Florida is thus stated in *Farnham* v. *Caldwell,* 141 Fla. 416, 193 So. 286 (1940), citing numerous prior Florida cases:

> "Certiorari is a common-law writ which issues in the sound judicial discretion of the court to an inferior court, not to take the place of a writ of error or an appeal, but to cause the entire record of the inferior court to be brought up by certified copy for inspection, in order that the superior court may determine from the face of the record whether the inferior court has exceeded its jurisdiction, or has not proceeded according to the essential requirements of the law, in cases where no direct appellate proceedings are provided by law."

The writ is used in Florida only "to quash illegal judgments, not to assume and complete the adjudication of a cause". *First Nat. Bank* v. *Gibbs,* 78 Fla. 118, 82 So. 618, 620 (1919).

Even when the writ runs from the Florida Supreme Court to a Circuit court of that state (the Circuit court being the highest court of original jurisdiction), "the Supreme Court will not question the correctness of the judgment of the Circuit court upon its merits." *Farnham* v. *Caldwell,* 141 Fla. 416, 193 So. 286, 287 (1940), citing prior cases.

Late words to the same effect were spoken by the Florida court in 1943. In *Wolkowsky* v. *Goodkind,* 153 Fla. 267, 14 So. 2d 398, 402, the Court said:

> "The review in this Court on certiorari addressed to a judgment of the Circuit Court rendered in the exercise of its powers as an appellate court is limited by the scope of the common law writ. The scope of review is much narrower than on appeals. We have held that on review by certiorari, the general rule is that the sufficiency of the evidence or the weight and probative force of conflicting testimony will not be considered."

And in *Stansell* v. *Marlin,* 153 Fla. 421, 14 So. 2d 892 (1943), the Court reaffirmed what it had said in prior cases:

> "The exercise of jurisdiction under writ of certiorari is quite different from the exercise on appeal or writ of error. The former is a discretionary writ used to determine whether the essential requirements of the law have not been complied with to the material injury of petitioner. An appeal or writ of error is taken as matter of right to have determined whether harmful error has been committed."

Those statements by the Florida Supreme Court are reminiscent of the views expressed by this Court in *Wade* v. *Mayo,* 334 U.S. 672, 680, (1947):

> "Writs of certiorari are matters of grace. Matters relevant to the exercise of our certiorari discretion frequently result in denials of the writ without any consideration of the merits. The constitutional issue may thus have no bearing upon the denial of the writ. Where it is apparent or even possible that such would be the disposition of a petition for certiorari from the state court's judgment, failure to file a petition should not prejudice the right to file a habeas corpus application in a district court. Good judicial administration is not furthered by insistence on futile procedure."

There are three other indications, virtually demonstrative, that this Court's holding in *Alabama Public Service Commission* v. *Southern Ry. Co.*, No. 395, October Term 1950, decided May 21, 1951, that Southern Railway had an adequate remedy in the Alabama State courts is no holding that in this case the Atlantic Coast Line has such a remedy in the State courts of Florida. (1) The Alabama Court "is empowered to set aside a Commission's order found to be contrary to the substantial weight of the evidence" (Alabama Code 1941, Title 48, Sec. 82); but in Florida the Supreme Court of the State itself says that it has no such power. *Wolkowsky* v. *Goodkind*, 153 Fla. 267, 14 So. 2d 398, 402 (1943). (2) The appeals provided by the Alabama law "are 'supervisory in character' ". Not so in Florida; its Supreme Court eschews such supervision. (3) The Supreme Court of Alabama has held that judicial review in that State of Commission orders "calls for an independent judgment as to both law and facts when a denial of due process is asserted". The Florida Supreme Court has made no such allowance. On the contrary it has said explicitly that on certiorari the record will not be examined "for the purpose of determining whether the evidence was of sufficient probative force to sustain the verdict, nor to reconcile conflicting testimony". (*Brinson* v. *Tharin*, 99 Fla. 696, 127 So. 313, 316 (1930)); and that when certiorari is granted, "the subject matter of the suit is not here re-investigated, tried and determined upon the merits generally as upon appeal or writ of error". (*Jacksonville American Pub. Co.* v. *Jacksonville P. Co.*, 143 Fla. 835, 197 So. 672, 674 (1940)).

Supersedeas Not Available in Florida

Certiorari in Florida is not only a matter of grace as opposed to a matter of right, and one wholly within the dis-

cretion of the Florida Supreme Court, but, more importantly, there is no method in Florida in cases of certiorari, as in Alabama upon appeal there is, by which a negative order of the Florida Commission may be superseded.

The Alabama statutes specially contemplate that supersedeas may be awarded in connection with an appeal from an order of the Alabama Commission which declines or refuses to take action applied for by a carrier as well as in cases in which an order of that Commission's is affirmative in its operation (Alabama Code 1940, Title 48, Sec's 81, 84, 88).

Supersedeas in connection with certiorari is unavailing in Florida on two scores. The Florida statutes and rules of court provide for supersedeas only where the application is made to the Supreme Court to review an order of a *court* (Fla. Stat. 1941, Sec. 59.13(7); Rule 35(f) Supreme Court Rules of Practice). Further, the provisions in Florida read only that if the proper machinery is set in motion the "court may [not that it must] grant a supersedeas or stay . . .". And where the order involved is a negative one merely denying an application to curtail train service, a supersedeas would be as ineffective to permit curtailed operation as would a supersedeas upon an appeal taken from an order of a court refusing to grant a conventional injunction. In each case, there would be nothing to supersede.

The case here therefore is of the same sort as specified in *Pacific Tel. & Tel. Co.* v. *Kuykendall,* 265 U.S. 196 (1924) "where supersedeas was not available to adequately protect federal rights" (*Alabama Public Service Commission* v. *Southern Railway Co.,* No. 395, October Term 1950, decided May 21, 1951, n. 10), and the propriety of the exercise of Federal jurisdiction was upheld.

As if that were not enough, there are specific holdings in some earlier Florida cases that in a case like that before us now a railroad company has no affirmative remedy at all, but can only disobey an adverse order of the Florida Commission's and then sit and wait to see what action if any the Commission itself will institute.

In *Florida East Coast Ry. Co.* v. *State*, 79 Fla. 66, 83 So. 708, 715, 716 (1920) the Court said:

> "It has been held by this court that where the Railroad Commissioners exceed or abuse the authority and discretion conferred upon them, by making an order that illegally invades the property rights of a railroad company, the illegality of the order is available as a defense in proceedings at law to compel the company to obey the invalid order, or in an action for a statutory penalty for a violation of the order; therefore the remedy at law is adequate, and an injunction will not be granted in the absence of some ground for equitable relief. Louisville & N. R. Co. *v.* Railroad Com'rs., 63 Fla. 491, 58 South. 543, 44 L.R.A. (N.S.) 189.
>
> "In view of the statutes and of the decisions of this court, it must be assumed that the statutes contemplate that if those who are to observe the administrative rates, rules, and orders of the Railroad Commissioners, duly and reasonably assert the invalidity of the rates, etc., as they affect private property rights, and decline to observe the rates, etc., the Railroad Commissioners shall, in due course and without needless delay, test the validity of their action by invoking appropriate judicial proceedings to enforce the questioned rate, etc. When this is done, those who assert a violation of their organic property rights may contest the enforcement of the challenged rates, rules or regulations".

At the trial in the District Court the Florida Commission in support of its motion to dismiss took this

very view, viz., that the Coast Line should have curtailed the service anyway and then awaited such action, if any, as the Commission might bring. It is to this that Circuit Court Judge Russell specially concurring (96 F. Supp. 588) alluded when he wrote:

> ". . . that the plaintiff could not disregard the order of the Commission without becoming subject to a possible penalty of $5,000.00 for each violation of the Commission's order as provided by Florida statutes of 1941, section 350.28, F.S.A., by proceedings instituted under Florida statutes of 1941, section 350.36 F.S.A."

No remedy at all is afforded by such a compelled quiescense. No legal remedy is adequate or complete "where the adequacy and completeness of the remedy depend on the will of the opposing party". (*Baker* v. *Farish*, 244 Ala. 178, 12 So. 2d 547 (1943); *Harrell* v. *Vieg*, 246 Ala. 669, 22 So. 2d 94 (1945)). For a remedy to be adequate it must be one "vested in the complainant to which he may at all times resort at his own option, fully and freely, without let or hindrance". (*Columbian Cat Fanciers, Inc.* v. *Koehue*, 96 F. 2d 529 (C.A.D.C. 1938)).

All those considerations indicate that this case is squarely covered by *Spector Motor Service* v. *O'Connor* (decided March 26, 1951), —— U. S. ——, 95 L. Ed., Adv. Sh. p. 435. When Spector came to this Court in 1944 it was remanded to the District Court "with directions to retain the bill pending the determination of proceedings to be brought in the State Court in conformity with the opinion rendered". That having been done, this Court said, March 26, 1951 (95 L. Ed., Adv. Sh. p. 437, 438):

> "The United States District Court had jurisdiction over this case in the first instance because of the uncertainty of the adequacy of a remedy in the state

courts, and it did not lose that jurisdiction by virtue of the later clarification of the procedure in the courts of Connecticut. American Life Ins. Co. *v.* Stewart, 300 US 203, 81 L. ed. 605, 57 S. Ct. 377, 111 ALR 1268; Dawson *v.* Kentucky Distilleries & Warehouse Co., 255 US 288, 65 L. ed. 638, 41 S. Ct. 272".

And so we submit, in any view of the matter, that it is apparent that the Florida procedure for a review of the Commission's orders is inadequate "to preserve for ultimate review in this Court federal questions arising out of such orders" (*Alabama Public Service Commission* v. *Southern Ry. Co.*, No. 395, October Term 1950, decided May 21, 1951).

IV

If There Once Were a Remedy in the Florida Courts It Has Been Lost by No Fault of the Appellee's

It is quite unrealistic to say that Coast Line now has available to it any remedy at all under the Florida procedure—for the time within which certiorari might have been applied for expired 60 days after the rendition of the Commission's order on October 19, 1950. Fla. Stat. 1941, Sec. 350.641 requires that all petitions to the Florida Supreme Court for certiorari to review orders of the Florida Railroad and Public Utilities Commission "shall be filed in the Supreme Court within sixty days after the entry or rendition of the order sought to be reviewed".

When the railroad company was confronted with the Commission's order it had two courses left open to it: To proceed as it did in the courts of the United States which for 75 years had exercised their jurisdiction to review such orders and in proper cases had enjoined their enforcement; or to apply to the Supreme Court of Florida for certiorari. When it chose the path marked out by the National courts, Coast Line was following the rulings an-

nounced in the following nine cases by six Circuit Judges and fourteen District Judges during a period which began in 1916:

Delaware L. & W. Ry Co. v. *Van Santvoord et al.*, 216 F. 252 (D. C. N.Y. 1914); 232 F. 978 (D.C. N.Y. 1916);

Great Northern Ry. Co. v. *Nagle*, 16 F. Supp. 532 (D.C. Mont. 1936);

Northern Pacific Ry. Co. v. *Board of Railroad Commissioners of Montana*, 46 F. Supp. 340 (D.C. Mont. 1942);

Chicago, B. & Q. R. Co. v. *Board of Railroad Commissioners*, 78 F. Supp. 1010 (D.C. Mont. 1947);

Atlantic Coast Line R. Co. v. *Public Service Commission of South Carolina*, 77 F. Supp. 675 (D.C. S.C. 1948);

C. B. & Q. R. Co. v. *Illinois Commerce Commission*, 82 F. Supp. 368 (D.C. Ill. 1949);

Southern Railway Co. v. *Alabama Public Service Commission*, 91 F. Supp. 980 (D.C. Ala. 1950);

Ann Arbor R. Co. v. *Michigan Public Service Commission*, 91 F. Supp. 668 (D.C. Mich. 1950);

Atlantic Coast Line R. Co. v. *Alabama Public Service Commission*, 92 F. Supp. 579 (D.C. Ala. 1950).

The Florida statute limiting certiorari to 60 days, there is now no method for the review of the order if this Court enters in this case the same sort of judgment it did in the Southern Railway case from Alabama. (*Alabama Public Service Commission* v. *Southern Railway Company*, No. 395, October Term 1950, decided May 21, 1951). Thereupon the Coast Line will be without any remedy at all simply because it did not anticipate that this Court would find it appropriate to reverse the long prevailing practice in cases of this sort. It is not true here as in Southern Rail-

way's case this Court found it was, that the enforcement of the rule announced in that case was "but a recognition . . . that a federal court of equity . . . should stay its hand in the public interest when it reasonably appeared that the private interests will not suffer . . .". Private interests—but private interests much affected with a public interest—will suffer here, and that right grievously at the rate of $3800.00 a month while the slow procedural process, begun all over again, is being unwound before the Florida Commission.

For these reasons we urge that in any event if a reversal must result here, its declaration be so modified so as to allow the Atlantic Coast Line to apply to the District Court for a temporary restraining order against the enforcement of the Florida Commission's order until such reasonable time as the Railroad Company might require to proceed in the Florida State courts. Such a direction to the District Court would be in consonance with the following holdings of this Court:

Railroad Commission v. *Pullman Co.*, 312 U.S. 496 (1941) in which the Court, at page 501, said:

> "We therefore remand the cause to the district court, with directions to retain the bill pending a determination of proceedings, to be brought with reasonable promptness, in the state court in conformity with this opinion".

Spector Motor Co. v. *McLaughlin*, 323 U.S. 101 (1944) in which the Court, at page 106, gave direction:

> "We therefore vacate the judgment of the Circuit Court of Appeals and remand the cause to the District Court with directions to retain the bill pending the determination of proceedings to be brought with reasonable promptitude in the State court in conformity with this opinion".

Equally apropos we think is *St. Louis, etc. R. Co.* v. *Public Commission,* 279 U.S. 560 (1929) where a final decree of a 3-Judge Court in a somewhat comparable case was vacated, but the restraining order rendered by that court was continued, to the end that the subject matter of the controversy should be determined on its merits "without subjecting the railway to any prejudice because of its failure to ask leave before discontinuing the service" of certain passenger trains.

It is respectfully submitted therefore in conclusion that the appeal should be dismissed; that if it is not the decree should be affirmed, and that in any event the Appellee should not be remitted to the Florida State courts without a temporary restraining order from the District Court which will protect the Railroad Company from continued losses while this litigation continues in the Florida courts.

Respectfully submitted,

CHARLES COOK HOWELL,
P. O. Box 461,
Wilmington, North Carolina;
G. L. REEVES,
Stovall Professional Building,
Tampa, Florida;
FRANK G. KURKA,
P. O. Box 461,
Wilmington, North Carolina;
Attorneys for Appellee.